Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

British Colombia Maritime Employers Association,

applicant,

and

International Longshore and Warehouse Union-Canada; International Longshore and Warehouse Union Ship & Dock Foremen, Local 514,

respondents.

Board File: 28554-C
Neutral Citation: 2011 CIRB 574
March 28, 2011

On January 27, 2011, the British Columbia Maritime Employers Association (BCMEA) requested that the Canada Industrial Relations Board (the Board) review and set aside its decision in *British Columbia Maritime Employers Association*, 2011 CIRB 566 (RD 566), pursuant to section 18 of the *Canada Labour Code* (*Part I Industrial Relations*) (the *Code*). In RD 566, the Board concluded, on the basis of the evidence presented to it, that there had not been a failure by either of the parties to bargain in good faith and make every reasonable effort to enter into a collective agreement, and thus that there had not been a contravention of section 50(*a*) by either of the parties. It is this conclusion that the BCMEA now seeks to set aside.

The BCMEA's request was referred to a panel of the Board composed of Ms. Elizabeth MacPherson, Chairperson, and Ms. Judith F. MacPherson, Q.C., and Mr. William G. McMurray, Vice-Chairpersons. Having reviewed the written submissions of the parties, the Board is satisfied

that an oral hearing is not required and has therefore exercised its discretion pursuant to section 16.1 of the *Code* to decide the matter without an oral hearing.

I–Background

[1] The BCMEA is a voluntary association composed of some 62 member companies who conduct business on Canada's West Coast. Among the BCMEA's members, 19 are identified as "direct employers" of longshoremen and longshore foremen. Various locals of the International Longshore & Warehouse Union-Canada (ILWU Canada) represent longshoremen; in many cases this is through voluntary recognition arrangements, but specific locals of the ILWU Canada also hold a certification order in respect of employees of named employers who are BCMEA members. Longshore foremen employed by BCMEA member companies are represented by the International Longshore and Warehouse Union Ship & Dock Foremen, Local 514 (ILWU Local 514), primarily as a result of certification orders issued in respect of specific employers.

[2] Since at least 1966, when the BCMEA was formed, it has been the practice on the West Coast to conduct collective bargaining on an industry-wide basis. As a result of this voluntary arrangement, the BCMEA and ILWU Canada enter into a coast wide collective agreement that applies to all longshoremen represented by the member locals of the ILWU Canada who work for the member companies of the BCMEA. Similarly, both before and after the merger of the Waterfront Foremen Employers Association (WFEA) and the BCMEA in 2005, the employers and ILWU Local 514 have negotiated a single collective agreement applicable to the longshore foremen.

[3] The collective agreements between the BCMEA and the ILWU Canada and ILWU Local 514 (collectively, the unions) expired on March 31, 2010. Notice to bargain for the renewal of the longshore agreement was given to the BCMEA by the ILWU Canada on November 25, 2009. On December 1, 2009, the BCMEA served the ILWU Local 514 with a notice to bargain in respect to the longshore foremen agreement.

[4] In March 2010, the Minister of Labour appointed two mediators to assist the parties in their negotiations. The reports and recommendations of the mediators were provided to the parties on September 22, 2010. The recommendations were accepted by the unions but rejected by the BCMEA. The Minister of Labour appointed another mediator on September 29, 2010, with a mandate to assist the parties in negotiating and drafting terms of reference for an arbitration process. This effort was unsuccessful.

[5] On November 2, 2010, the ILWU Canada and ILWU Local 514 each filed a notice of dispute with the Minister of Labour in respect of one of the BCMEA member companies, TSI Terminal Services Inc. (TSI). Shortly thereafter, on November 5, 2010, the BCMEA advised the Minister of Labour that, in its view, these notices of dispute were improper and highly destabilizing. The BCMEA pointed out that bargaining had, to date, been conducted on an industry-wide basis and argued that allowing the unions to single out TSI would be disruptive to the industry. In the BCMEA's view, the unions' action would increase uncertainty in an industry that is highly sensitive to the diversion of cargo by its customers. The BCMEA concurrently filed its own notices of dispute in respect of all of its members. In response to the notices of dispute, the Minister of Labour appointed a conciliation officer pursuant to section 72 of the *Code* on November 17, 2010.

[6] Meanwhile, on November 3, 2010, the Minister of Labour referred a question and gave a direction to the Board pursuant to section 107 of the *Code*. The threshold question that the Minister asked the Board to determine was whether, in the context of the current round of collective bargaining, the parties had contravened their statutory duty to bargain in good faith and make every reasonable effort to enter into a collective agreement (section 50(*a*) of the *Code*).

[7] The Board solicited written submissions from the parties and held a hearing in Vancouver on December 13, 14 and 15, 2010. The Board's decision, RD 566, was rendered on January 21, 2011.

II–Positions of the Parties

A–The BCMEA

[8] The BCMEA submits that, in reaching its decision, the Board made an error of law or policy that casts serious doubt on the interpretation of the *Code*. Specifically, the BCMEA alleges that the Board incorrectly framed the issue and, as a result, erred when it failed to find that the unions had bargained in bad faith when, in the context of industry-wide bargaining, they filed notices of dispute in respect of only one of the BCMEA's members.

[9] The BCMEA alleges that the unions' action in unilaterally resiling from an agreed upon bargaining protocol was an act of bad faith bargaining that contravened section 50(*a*) of the *Code*. It argues that the unions' attempt to isolate one member company of the BCMEA is unprecedented and a deliberate breach of the bargaining protocol to which the parties had committed themselves. The BCMEA suggests that the unions' motive was to "divide and conquer" by striking one employer to achieve the collective bargaining objectives that they were unable to obtain through industry-wide bargaining. The BCMEA argues that individual employer bargaining was not an option available to the unions under the agreed upon bargaining protocol and suggests that it would have been equally impermissible for the BCMEA to attempt to isolate one ILWU local or bargaining unit for the purpose of collective bargaining.

[10] The BCMEA submits that the Board erred in law or policy when it analyzed the unions' attempt to isolate TSI only from the standpoint of what the *Code* requires, and did not consider the impact of resiling from a mutually agreed to bargaining protocol on the unions' duty to bargain in good faith. It argues that the fact that industry-wide bargaining cannot be forced upon another party without its consent is irrelevant to the issue raised by the BCMEA: that once the parties voluntarily consented to industry-wide bargaining, it was bad faith for one party to resile from that agreement without the consent of the other party.

[11] The BCMEA further submits that the Board erred by relying on *Western Cablevision Ltd.* (1986), 65 di 150 (CLRB no. 573), as the facts in that case are distinguishable. In that case, the

Board found that one party could not force another party to agree to industry-wide bargaining when separate certifications or separate voluntary recognitions exist. In its case, the BCMEA argues that the unions had agreed to industry-wide bargaining and it was bad faith for them to resile from this agreement unilaterally in order to gain an advantage. The BCMEA argues that it was this breach of the bargaining protocol that the Board failed to address in RD 566.

[12] The BCMEA contends that the Board compounded its error by finding that, since the unions' notices of dispute regarding TSI did not result in any further strategic steps by the unions, the unions' conduct did not amount to a violation of section 50 of the *Code*. The BCMEA argues that the mere act of resiling from the agreed upon bargaining protocol constitutes bad faith and it is irrelevant whether or not this conduct was successful.

[13] In summary, the BCMEA argues that the Board addressed the wrong question when it focused on whether parties can be forced into industry-wide bargaining. It argues that, because the parties in this case had voluntarily entered into industry-wide bargaining for this round of negotiations, the proper question for the Board was whether it is a violation of section 50 of the *Code* for one party to unilaterally resile from an agreed upon bargaining protocol. The BCMEA suggests that the Board did not seek submissions on this issue and that this application for review is the first opportunity to deal with it. It asks that the Board set aside RD 566 and find that the unions violated section 50 of the *Code*.

B–ILWU Canada and ILWU Local 514

[14] The ILWU Canada and ILWU Local 514 filed a common response to the BCMEA's request for reconsideration of RD 566. The unions suggest that the BCMEA is asking the Board to consider an isolated event out of the context and to ignore a number of subsequent events, such as the BCMEA's filing of notices of dispute with respect to the employers other than TSI on November 5, 2010; the appointment of a conciliation officer in respect of all of the disputes by the Minister of Labour on November 17, 2010; and the resumption of bargaining between the unions and the BCMEA under the auspices of the conciliation officer.

[15] The unions contend that it was these subsequent events that led the Board to conclude that the filing of the notices of dispute in respect of TSI, without any further actions by the unions to follow up on that strategy, did not amount to a violation of section 50 of the *Code*. The unions argue that, in making this determination, the Board correctly applied its own jurisprudence, which adopts a contextual approach and establishes that the obligation to bargain in good faith and make every reasonable effort to enter into a collective agreement is an on-going one, such that subsequent events may cure an earlier defect (citing *Iberia Airlines of Spain* (1990), 80 di 165; and 13 CLRBR (2d) 224 (CLRB no. 796); and *Serco Facilities Management Inc.*, 2008 CIRB 426).

[16] The unions suggest that the BCMEA is seeking to have the reconsideration panel disregard factual findings made by the original panel and to substitute its judgement for that of the original panel. With respect to the alleged issue set out by the BCMEA, the unions point out that there is no written protocol setting out the terms upon which the parties agreed to conduct industry-wide bargaining. In particular, the unions state that there is no evidence that they agreed to waive their rights under the *Code* to invoke the conciliation process with respect to one or all of the employers, and that any agreement to waive rights under the *Code* is a serious matter that should only be inferred when there is a sufficient evidentiary basis on which to do so. The unions argue that, although the Board accepted in RD 566 that there was a practice and history of industry-wide bargaining, it did not find that the alleged protocol contained an implied term that the unions had agreed to waive their rights under the *Code*.

[17] The unions also submit that the Board has no jurisdiction to prohibit them from issuing a notice of dispute for a single employer or to compel them to issue such a notice for all of the employers collectively. They argue that, in the absence of a designation pursuant to section 33 (employers' organization) or a declaration under section 35 (common employer), the employer named on the bargaining certificate is the employer for all purposes of the *Code*. Furthermore, the unions point out, the Board has previously held that it has no jurisdiction to order a party to withdraw a notice of dispute (citing *Société Radio Canada*, 2001 CIRB 150).

[18] The union further argues that the BCMEA has not met the onus of establishing that the Board made an error of law or policy that casts serious doubt on the interpretation of the *Code* and that its application should be dismissed.

III–Analysis & Decision

[19] While section 18 of the *Code* provides the Board with the ability to "review, rescind, amend, alter or vary" any order or decision it has made, the Board rarely uses this power to reverse its decisions. As the Board has noted on a number of occasions, section 22 of the *Code*, which provides that "every order or decision of the Board is final," fulfills an important labour relations purpose and thus reconsideration of Board decisions pursuant to section 18 is the exception rather than the rule (see, for example, *591992BC Ltd.*, 2001 CIRB 140; and *Ted Kies*, 2008 CIRB 413). As a result, the onus on the party seeking to overturn a Board decision is a high one.

[20] In this case, the BCMEA has failed to persuade the Board that RD 566 contains an error that requires that the decision be set aside.

[21] The BCMEA alleges that the Board asked itself the wrong question, and should have asked whether it is a violation of section 50 of the *Code* for one party to unilaterally resile from an agreed upon bargaining protocol. With respect, that is not the question that was before the Board.

[22] The question put to the Board by the Minister of Labour, in her referral dated November 3, 2010, was "whether there has been a contravention by the parties of section 50(*a*) of the *Code* to bargain collectively in good faith and make every reasonable effort to enter into a collective agreement." In considering this question, as indicated in paragraph 22 of RD 566, the Board applied the test set out by the Supreme Court of Canada in *Royal Oak Mines Inc.*, [1996] 1 S.C.R. 369:

> [22] In reviewing the allegations of the BCMEA, the Board sought guidance from the decision of the Supreme Court of Canada in *Royal Oak Mines Inc.*, 1 S.C.R. 369. In the majority decision, Cory J. wrote:
>
> > XLII. Section 50(a) of the *Canada Labour Code* has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a

> collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions but as a general rule, the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry. It is this latter part of the duty which prevents a party from hiding behind an assertion that it is sincerely trying to reach an agreement when, viewed objectively, it can be seen that its proposals are so far from the accepted norms of the industry that they must be unreasonable.
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> (emphasis added)

[23] In order to conduct its analysis, the Board was required to look at the entire course of conduct between the parties, from the moment that the notices to bargain were given. Because the duty imposed by section 50(*a*) is a continuing one, the Board was also entitled to look at the parties' conduct following the Ministerial referral and up to the date on which it concluded its hearings. This is precisely what the Board did. The Board heard evidence that allowed it to conclude, as it did at paragraph 28, that historically collective bargaining has been conducted on an industry-wide basis; that the BCMEA has acted as the authorized employer bargaining agent on behalf of its member companies; and that this was the accepted protocol for the then-current round of bargaining.

[24] However, having reviewed all of the evidence presented to it, the Board was of the view, expressed in paragraph 30 of RD 566, that the unions' filing of notices of dispute solely with respect to TSI was "little more than another bargaining tactic or strategy to induce a reaction and see where it would lead." Despite the BCMEA's arguments that the Board did not ask itself whether this unilateral act to deviate from the agreed upon protocol of industry-wide bargaining constituted bad faith, it is clear from paragraphs 24 to 32 of RD 566 that the Board did consider that issue as part of its overall analysis, and was of the opinion that the union's conduct in issuing the notices of dispute pursuant to section 71 that named only TSI was not, in and of itself, a violation of section 50 of the *Code*.

[25] The Board understands that the central premise of the BCMEA's argument is that the historical practice of industry-wide bargaining should be accorded the status of a contractual commitment, and refer to it as a "protocol." The BCMEA grounds its allegation that the unions have acted in bad faith on its argument that any attempt to unilaterally resile from this protocol is improper and unlawful.

The BCMEA's arguments might have more traction if a written protocol actually existed, but neither the original panel nor the reconsideration panel have been provided with any such document. At the present time, the protocol appears to be no more than an unwritten understanding that bargaining will take place in a particular manner. Because there is no written protocol, the alleged agreement has no ascertainable terms– such as a provision setting out when and how one party could repudiate the agreement. In the absence of a document detailing the nature and terms of the agreement, the BCMEA is unable to make out a *prima facie* case that the unions' actions of November 2, 2010 constituted bad faith bargaining.

[26] The BCMEA alleges that the Board improperly relied on a prior decision, *Western Cablevision Ltd., supra*. In that case, a number of cablevision companies in the lower mainland of B.C. had engaged in five rounds of voluntary joint bargaining with the union representing their workers between 1975 and 1984. In 1985, the employers gave notice to bargain at a common table once again, but the union refused to participate in any joint bargaining involving a particular employer. In that case, the union's refusal to participate in bargaining with a common front of employers took place at the time the notices to bargain were served; in the instant case, the unions' attempt to break away from joint bargaining took place after bargaining had commenced. Despite this factual difference in the two cases, it was not an error of law for the Board to have relied, in RD 566, on the principle enunciated in *Western Cablevision*: when separate certifications or voluntary recognitions exist, a union is entitled to insist on bargaining separately for each bargaining unit.

[27] Given that the protocol for industry-wide bargaining does not contain any ascertainable terms as to how and when it can be terminated, it was also not an error for the Board to find that the union was entitled to request that bargaining proceed only with one individual employer. The Board also notes that the unions' filing of notices of dispute applicable only to TSI did not mean that they refused to recognize the BCMEA as the bargaining representative of TSI. The notices of dispute that the unions sent to the Minister on November 2, 2010 were copied to the BCMEA as well as TSI. The Board therefore finds no merit in the BCMEA's argument that the unions' notices of dispute regarding TSI were an attempt to circumvent the legitimate representational capacity of the BCMEA.

[28] Accordingly, the Board can find no error of law or policy in RD 566 that would warrant reconsideration. The BCMEA's application pursuant to section 18 is therefore dismissed.

[29] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

Judith F. McPherson
Vice-Chaiperson

William G. McMurray
Vice-Chaiperson